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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to	)	PR Docket 93-144
Facilitate Future Development of SMR Systems in the	)	RM-8117, RM-8029,
800 MHz Frequency Band	)	RM-8030

To: The Commission

COMMENTS

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To: The Commission

COMMENTS

BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Enterprises, Inc., and BellSouth Cellular Corp. (collectively "BellSouth"), by their attorneys, hereby submit these Comments in response to the Commission's *Notice of Proposed Rulemaking* in PR Docket 93-144, FCC 93-257, 58 Fed. Reg. 33,062 (1993) (*NPRM*). In these Comments, BellSouth urges the Commission to modify its proposed rules to give wireline carriers a meaningful opportunity to apply for and hold licenses as Enhanced Mobile Service Providers.

INTRODUCTION & SUMMARY

The *NPRM* envisions a new licensing scheme for Specialized Mobile Radio ("SMR") systems that will give licensees increased flexibility to provide service throughout broad geographic regions. Under this new scheme, "Expanded Mobile Service Providers" ("EMSPs") would be granted exclusive licenses for use of SMR channels at any location within a large, predefined geographic area, except where their channels have already been licensed to another existing SMR provider.

Specifically, the Commission proposes to permit SMR channels to be aggregated for operation of wide area systems within Major Trading Area or Basic Trading Areas (collectively "MTA"). Initial licenses will only be granted to those entities who were SMR licenses on or before May 13, 1993.

One initial license will be awarded per MTA.[1/] After the initial license is awarded, subsequent applications will be granted on a first-come first-served basis.

Currently, SMR providers are licensed to use specific channels only at particular locations. The new EMSP licensing paradigm would move SMR licensing closer to the cellular model: a cellular system's license reserves to the licensee the right to use a block of spectrum throughout its service area, not only at specific transmitter locations.[2/]

The licensing scheme for EMSP proposes to utilize existing SMR eligibility rules which exclude "wireline telephone common carriers" ("wirelines").[3/] In 1986, the FCC acknowledged that there did not appear to be any justification for the wireline exclusion and proposed in PR Docket 86-3 to eliminate the ban on wireline carriers' eligibility for SMR licenses.[4/] The Commission took

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[1/] If more than one application is filed for an initial license in an MTA, the Commission will provide the applicants 60 days to resolve the conflict, either by creating a consortium or some other means, and, if the conflict cannot be resolved, the Commission will either conduct a lottery or proceed to auction, if statutory authority and implementing regulations for competitive bidding are in place.

[2/] *See* 47 C.F.R. § 22.902. The new licensing scheme would also mirror early cellular rules by proposing a coverage requirement on licensees; an EMSP system must cover at least 80 percent of the population or geographic area within the MTA.

[3/] 47 C.F.R. § 90.603(c); *Land Mobile Radio Service*, Docket 18262, *Second Report and Order*, 46 FCC 2d 752, 763-64 (1974), *recon. on other grounds, Memorandum Opinion and Order*, 51 FCC 2d 945 (1975), *aff'd sub nom. NARUC v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). The rule specifically applies only to landline local exchange telephone companies, such as BellSouth Telecommunications, Inc., *see SMR Eligibility*, PR Docket 86-3, *Order*, 7 FCC Rcd. 4398, 4398 n.1 (1992), and does not by its terms restrict the holding of SMR licenses by subsidiaries, affiliates, sister companies, holding companies, or commonly owned companies. Nevertheless, Commission staff officials have advised parties informally that in their opinion the rule applies to such related companies. Accordingly, other BellSouth companies, such as BellSouth Enterprises, Inc. and BellSouth Cellular Corp., which do not provide landline telephone service, have been affected by the rule as interpreted by the staff. *See, e.g.*, letter from Richard T. Shiben, Chief, Land Mobile and Microwave Division, to F. Thomas Moran, Esquire, dated February 9, 1988 (permitting non-controlling wireline SMR investment on the basis that the SMR "systems will not themselves be operated by a wireline common carrier").

[4/] *SMR Eligibility*, PR Docket 86-3, *Notice of Proposed Rulemaking*, 51 Fed. Reg. 2910 (Jan. 22, 1986).

six years to act on its proposal, however, and in 1992 terminated the docket, leaving the wireline ban in place.[5/]

Since proposing to allow wireline entry into the SMR field in 1986, the Commission has in rapid succession conducted a wide variety of rulemakings expanding the opportunities available in the SMR field. Wireline carriers remained excluded from all of these opportunities:

- 900 MHz SMR systems;[6/]
- Expanded availability of 800 MHz frequencies for SMRs;[7/]
- SMR provision of service to individuals;[8/]
- Creation of "Enhanced SMR" systems comparable to cellular in scope and capacity;[9/]
- 220 MHz SMR systems;[10/]
- Short-spacing of SMR facilities for more intensive coverage;[11/]
- Elimination of the need for end user SMR licenses;[12/] and
- Proposed expansion of the scope of SMR operations within existing bands and establishment of a new band of "innovative shared use" SMR frequencies.[13/]

Despite inherent problems in the SMR eligibility rule, wirelines have been unjustly precluded from participation in all the aforementioned opportunities. The subject proceeding proposes to utilize the SMR eligibility rule before the Commission addresses petitions for reconsideration filed

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5/ *SMR Eligibility*, PR Docket 86-3, *Order*, 7 FCC Rcd. 4398, 4398 n.2 (1992) (*Termination Order*), *pets. for recon. pending; pet. for review pending sub nom. BellSouth Corp. v. FCC*, No. 92-1334 (D.C. Cir.). Judicial review has been held in abeyance pending disposition of the petitions for reconsideration filed by Southwestern Bell and Bell Atlantic.

6/ *900 MHz Reserve Band*, Gen. Dockets 84-1231, 84-1233, 84-1234, *Report and Order*, 2 FCC Rcd. 1825, 1829-1836 (1986), *recon. denied*, 2 FCC Rcd. 2515, *further recon. denied*, 2 FCC Rcd. 6830 (1987).

7/ *Subparts M and S*, PR Docket 86-404, *Report and Order*, 3 FCC Rcd. 1838 (1988), *recon. denied*, 4 FCC Rcd. 356 (1989).

8/ *Id.*

9/ *Fleet Call, Inc.*, 6 FCC Rcd. 1533 (1991).

10/ *220-222 MHz Private Land Mobile Services*, PR Docket 89-552, *Report and Order*, 6 FCC Rcd. 2356 (1991), *recon. denied*, 7 FCC Rcd. 4484 (1992).

11/ *SMR Co-Channel Short Spacing*, PR Docket 90-34, *Report and Order*, 6 FCC Rcd. 4929 (1991).

12/ *Elimination of SMR End User Licensing*, PR Docket 92-79, *Report and Order*, 7 FCC Rcd. 5558 (1992).

13/ *Part 88 Rulemaking*, PR Docket 92-235, *Notice of Proposed Rulemaking*, 7 FCC Rcd. 8105 (1992).

in PR Docket 86-3. These petitions raise critical issues regarding the current validity of the SMR eligibility rule. The effect of any decision by the Commission on reconsideration in PR Docket 86-3, or the courts on review, striking down the wireline ban would be effectively vitiated if initial EMSP licensing in major markets has already been concluded. Proceeding with the application and licensing process based on exclusion of wireline carriers would thus frustrate judicial review of the wireline SMR ineligibility rule. Thus, while BellSouth is not opposed to the concept of EMSP, it maintains that wirelines must, as a matter of law and policy, be eligible for EMSP licenses.

In these Comments, BellSouth demonstrates that the SMR rules that prevent wirelines from holding SMR licenses may not be used to define EMSP eligibility. The *NPRM* does not set forth any basis for excluding wirelines from EMSP eligibility. Moreover, BellSouth has shown in PR Docket 86-3 and PR Docket 92-235 that the rules preventing wirelines from holding SMR licenses are unlawful and must be eliminated.

To remedy the effects of past and proposed eligibility restrictions on wirelines, BellSouth urges the Commission to complete its reconsideration of the eligibility restrictions in PR Docket 86-3 before adopting final rules in this docket. In addition, the Commission should revise the eligibility rules for initial EMSP filings and permit initial EMSP applications to be filed by any existing SMR with constructed facilities, or any entity with pending applications to acquire such facilities, as of the date of the initial EMSP filing period. The Commission should also permit freer transferability of EMSP licenses, which would alleviate some of the past restrictions on wireline SMR holdings.

These Comments also urge the Commission to eliminate the 42-channel limit that has been proposed for second-phase EMSP applicants; this limit would unnecessarily inhibit entry of new EMSP providers. The Commission should also forbid the participation in EMSP application by SMR system managers, in order to minimize system managers' opportunities to exercise *de facto* control over the systems they manage.

DISCUSSION

I. WIRELINE TELEPHONE COMMON CARRIERS MUST BE ELIGIBLE FOR EMSP LICENSES

For the reasons discussed below, BellSouth submits that the current SMR eligibility rule may not be utilized for defining EMSP eligibility.

A. The *NPRM* Provides No Basis For Excluding Wireline Telephone Common Carriers From Eligibility for EMSP Licenses

The *NPRM* proposes to create a new type of service provider, the EMSP.[14/] While new rules are established solely for EMSPs, the Commission also proposes to subject EMSPs to rules governing SMRs. Thus, the SMR rules would be utilized to define eligibility for these new licenses. No rationale is provided, however, as to why the wireline restriction contained in the current SMR eligibility rule should be applied to this new type of service provider. In fact, no rational reason has been provided for excluding wirelines from holding SMR licenses, let alone EMSP licenses.

In establishing the regulatory framework for this new type of service provider, the Commission should set eligibility criteria for EMSPs which maximizes competition by allowing the participation of wireline telephone common carriers. Alternatively, the Commission should wait until petitions for reconsideration and appeals challenging the validity of the SMR eligibility rule in PR Docket 86-3 have been resolved prior to adopting EMSP rules. In any case, if the Commission intended to exclude wirelines from EMSP eligibility, it must engage in rulemaking that gives fair notice of its reasons for considering such eligibility restrictions and allow informed comment on its proposal. It has not done so here.

[14/] Even if the *NPRM* is viewed as expanding SMR service, as discussed *infra*, there is no valid basis for excluding wirelines.

B. Since the Commission Has Acknowledged that the Likely Original Bases for the SMR Eligibility Restriction are No Longer Valid, a New Rulemaking Must be Conducted Before that Eligibility Restriction can be Applied to EMSP

The Commission adopted the SMR eligibility rules, which exclude wirelines, in 1974.[15] No rationale was provided, however, for prohibiting wireline participation in SMR.[16] In 1986, the Commission proposed to eliminate the restriction, stating that the restriction had become "unnecessary" and that eliminating the rules would benefit the public by increasing competition.[17] Six years later, the Commission terminated the proceeding.[18]

In its *Termination Order*, the Commission found that "the origin of the wireline limitation was not explicitly discussed in either Docket No. 18262 or any subsequent proceeding" and that the likely bases for the rule no longer had any continuing validity.[19] It nevertheless retained the rule for the following new reason: SMR is a potential competitor of common carrier land mobile providers.[20] That decision is currently the subject of petitions for reconsideration filed by Southwestern Bell and Bell Atlantic, as well as a petition for appellate review filed by BellSouth.[21]

Furthermore, BellSouth has demonstrated in PR Docket 92-235 that the wireline ban cannot be sustained.[22] The Commission did not attempt to sustain the rule in the *Termination Order* based

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15/ *See* note 3, *supra*.

16/ *Id. See also* note 4, *supra*.

17/ *See* note 4, *supra*.

18/ *SMR Eligibility Order*, 7 FCC Rcd. 4398 (1992) (*Termination Order*), *pets. for recon. pending; pet. for review pending sub nom. BellSouth Corp. v. FCC*, No. 92-1334 (D.C. Cir.). Judicial review has been held in abeyance pending disposition of the petitions for reconsideration filed by Southwestern Bell and Bell Atlantic.

19/ *Termination Order*, 7 FCC Rcd. at 4398.

20/ *See* 7 FCC Rcd. at 4399 (footnote omitted). *See also 220-222 MHz Private Land Mobile Services,* PR Docket 89-552, *Memorandum Opinion and Order,* 7 FCC Rcd. 4484, 4488 (1992).

21/ *See* note 18, *supra.*

22/ Comments of BellSouth, PR Docket 92-235 (filed May 28, 1993).

on its presumed historical rationale. However, as BellSouth showed in its comments in PR Docket 92-235, it is well established that when the original reason for a rule ceases to exist, the rule cannot simply be carried forward indefinitely.[23] The Commission posited a new rationale for the rule in the *Termination Order*, but after-the-fact rationalizations do not satisfy the agency's obligation to conduct proper rulemaking proceedings, with an opportunity for comment on its reasons for adopting a rule.[24] To supply a new rationale for a rule which no longer has a valid basis, the Commission must conduct a new rulemaking, giving notice of the proposed new reasons for the rule and consider public comment.[25] Thus, announcing a new rationale in the *Termination Order* did not satisfy the procedural requirements of the Administrative Procedure Act ("APA"). Moreover, as BellSouth shows in the following section, the reason given in the *Termination Order* for retaining the rule does not support its decision. Accordingly, the SMR eligibility rule is not valid and cannot be carried over to the EMSP licensing scheme.

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[23] *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("In the rulemaking context . . . it is well settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision . . . has been removed.'") (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981)); *see also Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) ("The vitality of conditions forging the link between Commission regulations and the public interest is . . . essential to their continuing operation.")

[24] The explanation for a rule cannot "follow the rule long after it has been published." *ASH*, 713 F.2d at 799.

[25] *ASH*, 713 F.2d at 799-800. The court warned:

> The agency cannot have its proverbial cake and eat it too. If [the Order] does nothing more than to supply the explanation of basis and purpose absent in [the original decision], then [the Order] is invalid as a *post hoc* rationalization. If, on the other hand, [the Order] is in fact a *new* rule, then it must be promulgated in accordance with the rulemaking procedures demanded by section [553] of the Administrative Procedure Act, including its notice and comment requirements.

ASH, 713 F.2d at 800.

C. The Commission's New Rationale for the Eligibility Rule Does Not Support the Prohibition of Wireline Entry into SMR

As discussed above, the current rationale for the ownership restriction is that SMR is a potential competitor with common carrier mobile service providers.[26] The rule, however, does not prevent common carrier mobile service providers or any class thereof, such as cellular providers, from owning SMR facilities. Only wireline telephone common carriers, who are not necessarily involved in the provision of mobile services, are subject to the eligibility restriction. There is simply no "rational connection between the facts found and the choice made."[27]

If the purpose of the eligibility restriction was to prevent SMR competitors from entering the field, all common carrier mobile service providers should have been excluded from SMR. If, however, the purpose of the rule was to exclude cellular carriers from SMR eligibility, as indicated in PR Docket 89-552,[28] all cellular carriers should have been excluded. Excluding only wirelines from eligibility -- whether or not they provide services competing with SMRs -- does not support either goal. Thus, as indicated above, there is no connection between the purpose of the rule and its scope. Accordingly, the rule is arbitrary and capricious.[29]

Moreover, Section 553 of the APA requires agencies to give notice to the public of proposed rules.[30] Any such notice must include "either the terms or the substance of the proposed rule or a description of the subjects and issues involved."[31] Mere publication of the text of the proposed

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[26] *See* note 20, *supra.*

[27] *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

[28] In the *220-222 Mhz* decision, which was issued at the same time, affirming the exclusion of wireline carriers from a new SMR band, the Commission further explained that it was concerned with private land mobile service as a competitive alternative to *cellular* service in particular. *220-222 MHz Private Land Mobile Services*, PR Docket 89-552, *Memorandum Opinion and Order*, 7 FCC Rcd. 4484, 4488 (1992).

[29] If the purpose of the eligibility restriction was to prevent SMR competitors from entering the field, all common carriers should be excluded from SMR.

[30] 5 U.S.C. § 553(b).

[31] *Id.* at § 553(b)(3).

rule does not satisfy this notice requirement. The purpose of this notice requirement is to "provide an accurate picture of the reasoning that has led the agency to propose the rule . . ." so that interested parties can have a meaningful opportunity to contest the agency's reasoning if desired.[32] By providing a new rationale for the wireline restriction in the *Termination Order*, the Commission did not give the public an opportunity to contest its reasoning. Thus, the Commission's actions in the *Termination Order* violate the APA.

Since there is no rational relation between the rationale of the rule and its effect, the Commission should act on the petitions for reconsideration filed by Southwestern Bell and Bell Atlantic and await the completion of judicial review prior to deciding on the EMSP licensing scheme.[33] If the licensing scheme is established as proposed, and EMSP applications are accepted for filing prior to Commission action on the petitions for reconsideration, wirelines will be seriously prejudiced. If the Commission ultimately decides to remove the wireline restriction, wirelines will nevertheless have been precluded from obtaining initial licenses in many major EMSP markets because the initial filing windows will have closed prior to elimination of the restriction. Moreover, if the Commission denies the petitions for reconsideration, wirelines will be precluded from obtaining meaningful judicial review. While the eligibility question remains under review at the court of appeals,[34] numerous EMSP licenses will be awarded for which wirelines were ineligible to apply, irreparably harming wirelines and interfering with the Court's ability to render a just result in reviewing the decision in PR Docket 86-3..

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[32] *National Cable Television Ass'n v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984); *see also Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*,434 U.S. 829 (1977).

[33] *See* note 5, *supra*.

[34] *Id.*

II. WIRELINES SHOULD BE ALLOWED TO PARTICIPATE IN EMSP WITHOUT DELAY

To remedy the aforementioned past and proposed defective eligibility restrictions, BellSouth recommends that the Commission adopt all of the following measures:

First, the Commission should expeditiously issue a decision on the pending petitions for reconsideration in PR Docket 86-3, striking down the prohibition against wireline eligibility for SMR licenses. This will enable the wirelines to acquire constructed SMR facilities, and position themselves for entry into the EMSP business, should they choose to do so. Authorizing wireline SMR entry is essential before the Commission can proceed with EMSP authorization. Thus, if the Commission does not promptly reconsider its decision in PR Docket 86-3 and allow wireline entry, it should hold this rulemaking in abeyance pending judicial review of the decision in PR Docket 86-3.

Second, the Commission proposes initially to restrict EMSP license eligibility to applicants that are licensed on one or more SMR channels in the relevant MTA as of May 13, 1993. The Commission should eliminate the May 13th date, and instead push the cut-off date back to coincide with the date marking the end of the "initial filing period."[35/] Entities that are SMR licensees, or entities with pending applications to acquire constructed SMR facilities filed before the end of the initial filing period, should be eligible to apply for EMSP licenses during the initial licensing phase.

As stated in the *NPRM*, the Commission believes that the public interest would be served by allowing existing licensees to convert their existing systems to wide-area operations before newcomers are authorized to operate EMSP systems:

> Numerous SMR systems already occupy all 800 MHz SMR channels in many parts of the country. This extensive infrastructure, which is already in place, will as a practical matter be the foundation for any quality EMSP offering. Furthermore, if applicants without constructed systems were eligible for initial MTA licensing, they would be required nonetheless to protect existing co-channel systems, and their MTA systems would therefore surround and provide no wide-area service to large central regions.

35/ *See* proposed § 90.665(a).

> Existing licensees, in contrast, could increase overall spectrum capacity by aggregating and reusing their authorized frequencies at their existing sites.[36/]

The Commission thus perceived that a two-phase licensing approach would be beneficial, with first phase eligibility limited to existing SMR licenses. The Commission chose the adoption date of the *NPRM*, May 13, 1993, as the cut-off date. BellSouth submits, however, that the benefits of a two-step licensing process will be served equally well by determining eligibility on the basis of constructed facilities (including applications for acquisition thereof) as of the closing of the initial filing period. Under both scenarios -- the May 13 date, or the suggested "initial filing period" cut-off date -- initial phase applicants would be entities that operate constructed systems (or are in the process of acquiring constructed systems). Bellsouth's proposal would have the additional benefit of increasing the level of competition among EMSP licensees.

Third, the Commission should ease the proposed restrictions against alienation of EMSP licenses. The Commission proposes in the NPRM to prohibit assignment of EMSP licensees "for at least three years, and in no event will transfer be permitted before construction has been completed."[37/] BellSouth believes these proposed restrictions against alienation are too restrictive and would serve no useful purpose. Instead, EMSP licensees or permittees should be allowed to assign their interests at any time.

Wirelines have been restricted from the SMR business to date.[38/] While this restriction is currently under review, adoption of the alienation restrictions set forth in the *NPRM* will help perpetuate the wireline exclusion even if the restriction is lifted. The absence of vacant channels in major markets makes assignments and transfers of SMR licenses and associated EMSP licenses the

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[36/] *NPRM* at ¶24.

[37/] *NPRM* at ¶42. The Commission would also prohibit a licensee from assigning its license in a portion of the MTA, but would allow partial assignments for a portion of its channels throughout the MTA.

[38/] *See* discussion *infra.*

only way for new entrants, including wirelines, to acquire spectrum for new areawide EMSP systems.[39] Prohibiting assignments and transfers will merely serve to insulate SMR and EMSP licensees from new entry and competition, thereby disserving the public interest.[40]

Alienation restrictions under a lottery system would also undercut the allocational efficiency of the marketplace, in which licenses are acquired by entities for whom the spectrum would have the greatest utility, and therefore the highest value. The proposed alienation restrictions would thus tend to discourage efficient spectrum usage and encourage construction of minimally satisfactory systems barely meeting the requirements of the rules.[41] The public interest would be ill-served by a regulatory scheme that would foster developments of this nature.[42]

III. SUBJECT TO THE FOREGOING, BELLSOUTH DOES NOT OBJECT TO THE ENHANCED MOBILE SERVICE PROVIDER CONCEPT AND OFFERS ITS COMMENTS ON SPECIFIC PROPOSALS IN THE *NPRM*

BellSouth believes the EMSP concept would generally serve the public interest by providing licensees the necessary flexibility to expand capacity and coverage, and thereby create competitive networks to meet consumer needs. Accordingly, assuming wireline carriers are made eligible for EMSP licenses at the initial licensing stage, BellSouth does not object to the establishment of EMSP service.[43] BellSouth provides below suggested modifications to particular proposals raised in the NPRM.

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[39] As noted in the *NPRM*, "[n]umerous SMR systems already occupy all 800 MHz SMR channels in many parts of the country." *NPRM* at ¶24.

[40] It is noteworthy that new entrants into the SMR business have been responsible for some of the most innovative and competitive developments in the SMR industry. These companies, such as NexTel (formerly Fleet Call, Inc.), entered the SMR industry by acquiring existing systems.

[41] For example, the public interest would hardly be served if an EMSP licensee satisfied the 80 percent coverage requirement of proposed § 90.677(b) by constructing single channel sites.

[42] Under an auction system, alienation restrictions should be unnecessary and, in any event, would tend to prevent reassignment of spectrum to another operator if the winning bidder finds its business plans were overly optimistic.

[43] BellSouth opposes the adoption of EMSP rules that exclude wirelines, however.

A. The 42-Channel Limit for Subsequent EMSP Applicants Should Be Eliminated

The Commission proposes to limit subsequent-round EMSP applicants to 42 channels.[44/] This limitation was chosen based on the Commission's "belie[f] that this is the smallest block of channels necessary for a licensee to construct an economically viable wide area system that is able to take full advantage of the spectrum efficiency benefits of vigorous channel reuse."[45/] BellSouth submits that limiting subsequent-round applicants in this manner is unnecessarily restrictive, and will place such applicants at a competitive disadvantage with initial-round licensees who are not similarly restricted. The absence of a level playing field will likely inhibit entry by potential subsequent-round EMSPs, and thus deter competition and limit the availability of new services for consumers. While second-round applicants could conceivably deploy large networks by acquiring channels from existing SMR licensees, this process could be cumbersome and perhaps unworkable in markets where channels are unavailable. This would disadvantage new entrants without any valid reason.[46/]

B. Participation by SMR System Managers In EMSP Applications Should Be Forbidden

In the *NPRM* the Commission has tentatively decided to "preclude managers of constructed and operating systems from applying for an EMSP license during the initial filing period,"[47/] but would create an exception if the managed system were part of a consortium with full agreement of

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[44/] *NPRM* at ¶19. While the *NPRM* refers to a limit of "42 unconstructed channels," the proposed rules indicate that an applicant would not be eligible to apply for more than 42 channels after the initial phase, even if it proposed to use channels with constructed, operational SMR facilities. *Compare NPRM* at ¶7 *with* Proposed §§ 90.667, 90.677(b).

[45/] *Id.* at n.40.

[46/] The Commission proposed to exempt initial EMSP applicants from the 42 channel limit, but initial applicants would only be permitted to apply for channels with constructed SMR facilities. Subsequent applicants would not be limited to channels with constructed SMR facilities, but would not be allowed to apply for EMSP status on more than 42 channels at a time, even if those channels have existing, constructed SMR facilities in operation. No explanation is given for this discrepancy.

[47/] *NPRM* at ¶26.

the member licensees.[48/] The Commission requests comment on whether persons or entities with exclusive agreements to manage constructed and operating systems should be eligible at this point for EMSP licenses.[49/]

BellSouth believes that SMR system managers should be excluded entirely from the EMSP licensing process. Allowing SMR managers to obtain rights to expansion areas within markets of systems they manage would give managers effective control over expansion of the systems they manage, increasing their *de facto* control over such systems. SMR licensees interested in participating in an EMSP consortium should be required to do so directly, not through their manager. BellSouth is of the view that exclusion of managers from the process is necessary because a manager's participation in an EMSP system that would potentially compete with systems it manages would create a conflict of interest and loyalty with respect to managed systems.[50/]

[48/] *Id.*

[49/] *Id.*

[50/] Managers that are existing SMR licensees should be allowed to participate in an EMSP applicant only with respect to channels for which they are licensed in their own name.

CONCLUSION

Accordingly, BellSouth requests that the Commission's proposal be modified to permit wirelines to apply for and hold EMSP licenses, as discussed above.

Respectfully submitted,

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